

1 could declare this surplus and sell it if the Commissioner
2 wished to sell it. But even assuming those procedures were
3 followed and the estimated value has been placed on it by the
4 Commissioner as required by the regulations, which it was not,
5 we just don't have the proper process.

6 Clearly somewhere in the RFP there is reference to salvage
7 value, that is an even more obtuse reference in this sense.
8 Salvage under the State definition it says that there is no
9 reasonable prospect for use of the equipment. Well, of course,
10 we know there is a very reasonable prospect for use of the
11 equipment under both proposals.

12 Under ENA, it is so reasonable that they are willing to
13 offer \$7.5 million to buy that salvaged equipment and use it
14 for 18 months while it is billing the State to provide the
15 service through that system, which the State already owns.
16 This is a blatant violation of state law. It was subject or
17 could subject the state employees to disciplinary action, civil
18 action or criminal action depending on the degree of
19 culpability with which they have treated the state law, and
20 that may be the main reason why it is not in the State's best
21 interest to lift this stay.

22 If somebody goes and signs that statute, under that
23 contract, we have just broken the law, you have made an
24 agreement to sell something that you can't back that agreement
25 up. Maybe the Court will intervene and declare that the act

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1 tested; no dual ISDN lines was ever tested. Yet, that would
2 serve according to ENA 471 schools.

3 So we show you a test status and, I think, that is the
4 reason why the failure of ENA to test that equipment
5 irrespective of what somebody might have done on the spot
6 which, of course, is an unallowable change of an RFP
7 requirement because it wasn't in writing as required by the
8 State's rules and the RFP. Irrespective of that, you are
9 looking at the possibility of signing a contract with somebody
10 who couldn't prove after having hours and hours and days and
11 days to get ready that they could make a connection that they
12 are going to tell you that they are going to connect over 400
13 schools with.

14 Finally, with respect to the legal status of ENA. A lot of
15 those issues are simply unknowable to the general public. We
16 had information and I personally had talked to somebody who
17 gave me reason to believe that there may never have been two
18 LSC members to start, which means there was never an LSC under
19 the law. If there were, there were irregularities and
20 misrepresentations made to the State.

21 On that point, given that we are not in a court of law and
22 we don't have subpoena power, all we can do is ask and plead
23 with this State to perform its due diligence. It is not enough
24 to simply say our Secretary of State has a certificate,
25 therefore, everything is okay.

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1 was Ultra Vires and it doesn't have to be sold and therefore
2 there is no violation of the state law. But that sure is a big
3 mess to get into when we could cure that right now or it could
4 have been cured or should have been cured if the RFS was
5 properly drafted. Maybe it was, but the response was clearly a
6 response that would require the violation of state law to sell
7 the system to ENA.

8 Finally, we have two other issues. We had the test
9 equipment failure issue. The only issue we have to say about
10 that, and this is not to get into the protest area; it is
11 simply the State contemplates signing a contract with the party
12 that failed to test the equipment and solutions that would
13 serve more than half of all of the schools to be served by this
14 program.

15 We have a little chart that we included, it is the next to
16 the last document, right before the FCC Application. That
17 chart was modified by us, but it was created by ENA before the
18 testing and it shows several types of circuits and over in the
19 right-hand column we added the number of schools that ENA
20 proposed that would be served by each type of circuit.

21 You need to know that a single ISDN line and a dual ISDN
22 line are not just a matter of plugging in another line and
23 getting two. There is a lot more work involved and there is
24 different equipment involved. It is a different
25 solution, is what the engineers like to say. That was never

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1 The banking institutions aren't going to do that when they
2 look at this entity to determine whether they are going to make
3 a loan; the State certainly shouldn't do that. ENA has offered
4 to provide that material, let's see it. We are going to make
5 sure that the State does not get into a situation where
6 ultimately ConnectTEN and the children of Tennessee are harmed
7 because we rushed to get something done and we disregard some
8 very substantial problems under state law and under federal
9 law. Thank you. If you have any questions, I would be glad to
10 answer them.

11 MS. SHRAGO: Commissioner Hawkins, may I say a
12 few things?

13 COMMISSIONER HAWKINS: Yes, in a minute. I
14 would like to make a comment before we do that. I'm going to
15 give you ample time to respond because I think a number of
16 these are directly protest issue related and I think you should
17 be able to respond to those, but go ahead.

18 MS. SHRAGO: Well, I guess my first question is
19 I'm not clear in terms of the request for the lifting of the
20 stay, what it is that ISIS is requesting. Are you requesting
21 that the protest be heard or are you requesting that the state
22 property issue be resolved? I think the Commissioner very
23 clearly stated that we have a very clear time frame and that
24 that is our substantial issue. So in relation to that time
25 frame, which is the E-rate time frame, and I don't think it is

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on the record as what the E-rate time is, everything has to be delivered in Washington, not postmarked, but delivered in Washington April 15th. That is the absolute last day you can file anything and it has to be filed by the close of business on the

COMMISSIONER HAWKINS: For the current year of funding?

MS. SHRAGO: For the current year funding, yes, sir.

MR. NEY: Actually, I believe, it is April 14th at midnight.

MS. SHRAGO: It has been revised and that sort of thing.

MR. NEY: May I respond? I request, very simply that the stay not be lifted, we oppose. It is not our request, it is the Commissioner's request, and we oppose the request to lift the stay. The reason that protest issues come into play is because the Commissioner has articulated an interest to the stay. We have to ask the committee to balance all of these other factors and interests to determine ultimately what is in the best of the State.

COMMISSIONER HAWKINS: Given the extremely tight time line for this whole process from its birth to now, at the point that we are at right now in the 75 day window, up to April 14, in lifting the stay we look at what is the harm that

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I don't see how under the circumstances there could be a contract provision that would alter the fundamental pricing structure that ENA proposed that could somehow skirt the issue of the illegality of the proposed sale of state property. It would modify the contract so greatly, it would have to go back for rebid.

COMMISSIONER HAWKINS: But at this point we have listened to all of your points and, I think, that is why ENA has attorneys and I would like to hear from them.

MS. COTTRELL: Hi, I'm Patsy Cottrell with the law firm of Wyatt, Tarrant & Combs; I'm representing ENA. This is Dick Lodge with Bass, Berry & Sims. I'm going to try to respond directly to some of Mr. Ney's comments as well as to go to what I think was a logical presentation of the issues.

Essentially, if you do not lift this stay, the State of Tennessee and school children of the State of Tennessee very well, very likely, could lose their opportunity for this E-rate funding; it is a very tight window. All states or schools or school districts are going to be applying.

The State of Tennessee needs to get its signed contract; you have to have a signed contract, binding to the FCC along with the application forms that are required to be filed that establish all of services and that sort of thing. There is a very tight window so that is really what is in the substantial interest of the State. I think that is the factor that meets

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can come to the State financially by not lifting the stay and are there options that we can work through in this process or restrictions that we can put in this contract, but still work within that time frame.

MR. NEY: I think there are some options, Mr. Chairman. One of the options is that we first expedite the protest process. We now know that the Commission denied the protest and the next step would be for us to request the four of you to meet again.

COMMISSIONER HAWKINS: That is a ten day window on that and that puts us at April 13th

MR. NEY: That is assuming that we exercise to do that ten day window. If we asked right now, we could maybe here again tomorrow if you wanted to work on the weekend or on Monday at the latest.

COMMISSIONER HAWKINS: That would mean I would have to cancel my tee time in the morning.

MR. NEY: You may not have any choice with this weather, so we can do that. In addition, with regard to the FCC filing, we have asked for expedited review by the FCC. It is not the intent of anybody to try to slow this down and have the State fall out of line. With respect to its first priority funding, nevertheless, it is imperative to the State and we think that the State ought to be concerned about doing this properly and doing it legally.

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the test that statutorily you are to apply.

With regard to the issue on the purchase and sale of state property, state surplus property. First, I would point out that this committee and anybody reviewing the protest after this committee cannot consider that issue. You have ten days to raise any issue from when you knew or should have known. The RFP, the clarifications or answers and questions to the RFP as well as ENA's response to the RFP clearly, clearly, show that the State contemplated selling the entire network, asked for proposals that might envision that and our proposal clearly states we intend to purchase all right, title and interest in the network. Therefore, at the latest ISIS knew on March 20th that that was the situation. So we will assert, certainly at any protest hearing or later that they simply cannot raise those issues at that point in time; it is beyond the time and that is jurisdiction.

Secondly, however, I would say that I am confident -- first of all, I don't know of any requirements that all of the prior procedures would have had to have been complied with before the RFP went out or before the contract is signed. There is no proposal to transfer ownership in any of this network or its equipment until July 1. I'm confident that the State of Tennessee and its officials and its lawyers can figure out how to do that legally between now and July 1. If, in fact, there is even a legal issue. I'm certainly not saying that there is,

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1 but I'm quite confident that it can all be worked out if that
2 is what the State wants to do and feels that it is in the best
3 interest to do.

4 ISIS has said today and earlier that a big question to be
5 answered is why is there being \$23 million more spent for
6 comparable services? We will submit and have put in our
7 response to the protest that, in fact, the services are not
8 comparable. We are prepared to show to you today, if you want
9 to hear about it, some very brief examples of why the services
10 are not comparable.

11 But, additionally, we are not even sure that the cost
12 difference that they are asserting is, in fact, there. If you
13 look at their clarification of their cost proposal, you will
14 see clearly they have put one months total and a six months
15 total as exactly the same figure.

16 Using the standard rule for when you quote unit prices as
17 well as the total prices. The unit price would govern, the
18 monthly price would govern, and their six month total, in fact,
19 would result in, I think, \$123 billion total over the life of
20 the contract of hours. So you cannot assume that, in fact,
21 that the cost of the ENA proposal is \$23 million more than the
22 cost of this proposal.

23 In that regard, I would submit that if you look at the cost
24 proposal clarifications submitted by ISIS, you will see that
25 there is no way that the State of Tennessee could award a

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1 statement, in fact, the State of Tennessee and Ms. Shrago and
2 other people involved with this project in the State of
3 Tennessee have been intimately involved, have been advisors to
4 and consultants to the FCC. The State of Tennessee and its
5 officials have been very responsible in trying to ensure that
6 they, in fact, structured this RFS and the resulting time track
7 in a way that would maximize the opportunities to the students
8 in this state for the E-rate funding.

9 I have no idea why Mr. Ney would think that the State of
10 Tennessee has not talked to the FCC about the eligibility
11 issues. What the issue comes down to, in my understanding of
12 this, and I have read every piece of paper that the FCC has put
13 out on this issue, but it doesn't mean my understanding reaches
14 anywhere near Ms. Shragos.

15 What is going on? We the ENA has offered to sell the state
16 schools, it is not the State anymore, it is the state as a
17 consortium of schools, services. It is like cable TV, the
18 schools have a plug in and ENA has the point of presence in
19 this school, the school buys the services just like you buy
20 cable TV in your house. We have proposed varying levels of
21 services.

22 The school, and the consortium of schools, will not be
23 buying ISDN lines, routers, hubs and all of the various
24 equipment and software; they are buying a service from us. The
25 issues that ISIS has raised with regard to eligibility of the

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1 contract based on that proposal. So there is no option to
2 award a contract to ISIS on the basis of this RFS process.

3 Again, the standard here, as I understand from the statute,
4 is that an award of the contract without delay is necessary to
5 protect substantial interest of the State. The Commissioner
6 has presented and Ms. Shrago has presented what those interests
7 are. I think it is fairly clear it is an opportunity, a rare
8 opportunity, when which the window will close for this state
9 and its little children if you don't get a signed contract to
10 the FCC and all of the application forms and all of the
11 documentation that has to go to support it.

12 I sort of think of this as like a TRO kind of hearing that
13 the standard might, in fact, be that you might be concerned a
14 little bit about substantial likelihood on the merits in terms
15 of ISIS and that would be their burden to, in fact, show that
16 they were substantially likely to win on the merits of their
17 protest. I think that if you consider our response to the
18 protest and the very thorough report that was submitted by the
19 Department of Education dealing with all of the issues, that
20 you can feel comfortable that there is not a substantial
21 likelihood that ISIS is going to succeed on the merits of their
22 protest.

23 I would like to speak briefly to the issue of the E-rate
24 funding. Mr. Ney said, why doesn't the State of Tennessee talk
25 to the FCC. As Commissioner Walters explained in her opening

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1 E-rate funding, I will presume, I will relate to where, in
2 fact, the school or the school system or the state networks is
3 buying the equipment, that simply does not apply here.

4 Internet access is very clearly an E-rate eligible
5 function. I will be glad to show you this, this is under the
6 docket. This is the eligibility list from the FCC under their
7 docket for what services are eligible and not eligible for
8 E-rate funding.

9 Internet access is definitely E-rate eligible; that is what
10 is being sold and what is being bought. It is just like when
11 you buy cable. The cable company does not have to or does not
12 show to its customers how many service people it has doing
13 service or how many computers it has or how many computer
14 lines; that is really irrelevant.

15 If the school consortium is buying Internet access from
16 ENA, all of those issues about ISDN lines and certain kinds of
17 equipment and what people are going to do are totally
18 irrelevant. That is not submitted through the FCC and that is
19 not what they look at; it is whether it is the Internet access.

20 There is an issue about bundled access to the Internet and,
21 again, that is not relevant here. We are selling access to the
22 Internet and no content based added on services and that is the
23 only issue that ever gets into the Internet access issue.

24 So that is, in fact, unlike ISIS's proposal, although it
25 frankly was clear from reading the proposal, that it appears

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1 that ISIS does not intend to purchase the network; it will be a
2 state owned network. That in and of itself greatly jeopardizes
3 E-rate funding. The FCC has been absolutely clear about its
4 concerns about state owned networks being eligible for E-rate
5 funding; that is a much bigger and definite concern

6 In fact, I think we can cite those for you. I think
7 Ms. Shrager might be better than I to cite those for you, but I
8 can find those provisions. It is very clear that the FCC
9 became very concerned about state owned networks being
10 eligible. State owned networks are not eligible to receive
11 E-rate funding. I can find that language for you if that is
12 important.

13 The RFP set out the cost proposal evaluation methodology to
14 exactly how the winning or the most points are going to be
15 allocated and that is exactly what the state did. There is no
16 challenge to that and there is no challenge to the validity of
17 that proposal. It was always envisioned that one could offer
18 to purchase the network and supply and include that.

19 The dual ISDN lines issue frankly is, again, without merit.
20 There are dual ISDN lines operating right now in the ConnectEN
21 Network. There is no issue about interoperability for dual
22 ISDN lines, they are being used right now.

23 MS. SHRAGO: Let me just support her statement.
24 That is the fourth order 97-420.

25 MS. COTTELL: In conclusion, I guess, we would

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1 comfortable relying on her expertise in the area.

2 With regard to essentially the strong statement, if not
3 threats, regarding the State officials, potential liability
4 under this and with regard to the FCC's concern about potential
5 state actions. Again, I think that the State of Tennessee can
6 rely upon the judgment and the reasoning and the care that has
7 been exercised on this RFS by the state representatives and the
8 Department of Education. We are happy to answer any questions
9 that you-all might have.

10 COMMISSIONER HAWKINS: Jackie, would you mind
11 addressing frames and info around the FCC and the communication
12 with them and what the penalties are if we could move ahead
13 with a contract in light or in the midst of a protest? What
14 options do we have over the next ten days to work together to
15 work this out while we assume that the protest would move
16 ahead?

17 MS. SHRAGO: First of all, we have had
18 substantial discussions with the SLC. The SLC is the
19 administrative arm that is implementing this program for the
20 FCC. We have had substantial discussions with them, but our
21 attorney in Washington, who is an FCC lawyer, has had
22 substantial discussions with the general counsel of the FCC in
23 regards, specifically, to our situation, our award, our
24 contract and how we might proceed.

25 We had a clear understanding with the FCC that if we can

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1 want to second first of all the great importance to the State
2 and to the schools in this state of not losing this E-rate
3 money. Secondly, that I hope you have some comfort level that
4 if and when the merits of the protest are decided, that it is
5 not likely, in fact, that ISIS will end up succeeding.

6 As we said in our response essentially the ENA proposal
7 meets all of the requirements. Each and every evaluator
8 evaluated the ENA technical proposal as superior. And no
9 challenge is made to either the evaluation model or to how the
10 evaluators assigned points or to the validity of the technical
11 proposal offered by ENA. So you can feel comfortable that the
12 State is buying quality service that meets the RFP requirements
13 and provides quality service.

14 So, essentially, the groval of the protest which is, in
15 fact, hearable, excluding that issue on surplus property, is
16 that the State has exercised its judgment and its discretion in
17 a way that ISIS disagrees with. They don't think that ENA has
18 shown enough financial responsibility. The people who are in
19 the State who are charged with deciding that, have decided that
20 they do. It is not as if these were the requirements, here
21 they are disqualified automatically because they don't meet
22 them, again, it is a judgment issue.

23 On the E-rate funding, which is a significant issue, Ms.
24 Shrager probably knows as much or more about that than anybody
25 in the country, and I would suggest that you would be very

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1 sign a contract and have in it language which still protects
2 the protesting party, that the contract would be null and void
3 if the protesters rights are upheld, okay? If we sign a
4 contract with that stipulation in it, we can go ahead and file
5 with the FCC.

6 MR. LEE: So you have contacted the FCC and they
7 have to have a signed contract; they will not take a contract
8 that is not signed?

9 MS. SHRAGO: That is correct. But it can have
10 the language in it that I just mentioned.

11 MR. LEE: Does that make the whole process null
12 and void if that contract is thrown out?

13 MS. SHRAGO: Does it make the whole contract
14 null and void?

15 MR. LEE: I mean the application?

16 MS. SHRAGO: Yes.

17 MR. LEE: So that throws out the application and
18 everything if the contract is made a part of that application?

19 MS. SHRAGO: Right.

20 MR. LEE: That contract has the language in it
21 that that contract is null and void --

22 MS. SHRAGO: Uh-huh.

23 MR. LEE: -- upon the determination of the
24 protesters, correct?

25 MS. SHRAGO: Yes.

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1 MR. LEE: Then you have an application on file
2 that does not have a account, an enforceable contract?
3 MS. SHRAGO: That's true.
4 MR. LEE: So does that make the application,
5 itself, null and void?
6 MS. SHRAGO: Say that again, please?
7 MR. LEE: Does that make the application, before
8 the FCC, null and void?
9 MS. SHRAGO: Yes.
10 MR. LEE: So we will be at the FCC without an
11 application, we will not be in line?
12 MS. SHRAGO: That is correct. If the protest is
13 upheld, you are correct.
14 COMMISSIONER HAWKINS: And would that just
15 impact the current year funding --
16 MS. SHRAGO: Yes.
17 COMMISSIONER HAWKINS: -- only?
18 MS. SHRAGO: Yes.
19 COMMISSIONER HAWKINS: Given that and with the
20 current priority funding time line of April 14? Then April 15
21 is when the priority funding starts on a first come, first
22 serve, basis --
23 MS. SHRAGO: That's correct.
24 COMMISSIONER HAWKINS: -- up until July 1?
25 MS. SHRAGO: That's correct.

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1 MR. LEE: What about --
2 MS. SHRAGO: And we have checked out very
3 carefully with the general counsel of the SLC and I talked with
4 him specifically about this, they cannot accept a pro forma
5 contract in any way shape or form; that it is not a binding
6 situation. We can make a binding contract and have the means
7 to get out of it and then we have a contract and they will
8 accept that, but not a pro forma.
9 MR. LEE: But if you do that, then the
10 application is no good?
11 MS. SHRAGO: Well, the application is no good if
12 the protest is upheld. If the protest is not upheld, then we
13 have a good application. As we have indicated, we think on the
14 basis of the merits of the protest, that we have a fairly solid
15 case as to why the merits of the protest would not be upheld.
16 MR. LEE: Let me ask you this. Can you submit
17 two contracts with that language in it to sort of scotch the
18 wheels of both sides that if the protest is upheld and ISIS is
19 determined at the end that they are the winner, then you would
20 have two contracts and one of them is effective and one is null
21 and void because they both have identical language on that.
22 Then you have a binding contract, then is the application good?
23 MS. SHRAGO: I'm not certain that we can do
24 that. The reason is that this process essentially sets aside
25 funds in the name of the State of Tennessee consortium, on our

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1 COMMISSIONER HAWKINS: Do you have any idea what
2 that may mean in terms of dollars of priority funding? Let's
3 say the 25 million is impacted and we still get in the April 15
4 window there on a first come, first serve, basis, could you
5 speculate any at all what that impact might be?
6 MS. SHRAGO: It is very difficult to speculate,
7 Mr. Hawkins. The congress at this point has assured that there
8 will be two and a quarter billion dollars in funding in this
9 program. The most recent legislation that seems to be moving
10 through congress will support that; there has been a lot of
11 issues about changing and so forth.
12 If that amount of financing is in place, it means that
13 things are safer than they were when we looked at this a month
14 ago, but at this point no one, including the SLC, has any
15 information about the amount of requests. So if the request
16 exceeds the amount of money in the fund, then there is no money
17 available for 1998.
18 COMMISSIONER HAWKINS: It is kind of like
19 getting to the supper table ten minutes after the call.
20 MS. SHRAGO: It is very clear and abundantly
21 clear that we get absolutely nothing if we don't have a signed
22 account to move forward with.
23 MR. LEE: They will not extend that on the basis
24 that there is a protest pending?
25 MS. SHRAGO: No, sir.

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1 behalf, that is what the application does. So we would be
2 asking them to set aside double the amount of money we need.
3 It is not quite double because we are requesting more with ENA
4 because of the substantially different services, but there is
5 an amount of money that ISIS would be asking them to set aside.
6 That would be something that we would have to ask about.
7 We would certainly not do this without getting assurance from them
8 that that was an acceptable thing to do. I would be very
9 cautious about that.
10 But let me say as well, that in a more detailed review of
11 the cost analysis that ISIS provided in the E-rate supplement,
12 the costs that they presented do not make sense. We could not
13 submit those to the State, to the FCC because they are broad,
14 significantly broad.
15 The difference between the cost of one month and six
16 months, which is the difference of what we are presenting. The
17 exhibits that we have with the merits of the protest response
18 clearly shows the questions that we have regarding that. So we
19 would be hard pressed at this point to enter into a contract
20 with ISIS given that information.
21 MR. LEE: On the basis that the FCC would not
22 accept it?
23 MS. SHRAGO: On the basis that the State could
24 not accept it as well as the FCC. That document that they
25 submitted could not be submitted to the FCC.

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1 MS. COTTRELL: I personally don't think that the
2 State could enter into a contract based on their cost proposal
3 anyway if you just look at that sheet of paper, I think that is
4 clear.

5 My limited understanding of the FCC is that you have to
6 have a signed contract, that saves the money. You can only
7 submit an application where the State has money set aside to
8 cover its portion. So if you did two contracts, the State
9 would have to be saying we have \$10 million a year instead of
10 \$5 million a year; so that would be my reading.

11 MS. SHRAGO: I think that is accurate.

12 MR. NEY: Excuse me, that is not true because
13 then the alternative. If the State has that amount of money
14 and you know what the State is going to pay - there is only
15 one good contract. They never have to double dip; they don't
16 have to put the funds in the federal government. They just
17 have to say the money is set aside because there could only
18 ever be one alternative. Then the federal government has to
19 set money aside. There is a lot less required of the federal
20 government under the ISIS proposal than the ENA. Again, we are
21 not supposed to be sitting here badmouthing each others
22 specific proposals, but if ISIS gets it, then the Federal
23 government can smile because they are not going to have to pay
24 about \$7 million that was already set aside to pay --

25 MS. COTTRELL: I disagree.

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1 allows the obtaining of services where we pay both a one time
2 charge and a recurring charge; that is the way the form is
3 layed out and that is possible. The FCC has made no ruling
4 about how a service provider breaks down its cost.

5 There are no rulings whatsoever about how salvage value is
6 treated or how existing networks might be treated in terms of
7 any transfer, okay? So I would just assert that Mr. Ney is
8 incorrect in terms of the FCC.

9 Now I will also tell you that I have read some 3,500 to
10 4,000 pages of information from the FCC. I have depended a
11 great deal on an attorney, who is a lot more used to reading
12 this than I am, but I have gotten very, very familiar over the
13 last 15 months with this information. I just entirely assert
14 that Mr. Ney misunderstands because in part of his
15 misunderstanding of what a service provider can do and what a
16 state can do. A state cannot do certain things; a state cannot
17 purchase equipment. There are no limitations, none, on what a
18 service provider can purchase in order to deliver its service.

19 The FCC entirely expects that what we would do is go
20 through a competitive procurement process, the basic principles
21 of it, go through a competitive procurement process and make
22 sure it agrees with state rules and buy the services. Don't
23 buy equipment and manage it yourself; buy services

24 On the most fundamental level, we have met all of those
25 requirements. There are no rules regarding some of the things

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1 COMMISSIONER HAWKINS: I think you addressed
2 that, Jackie, on the issue of the State owning the network
3 versus vendor owning it. Tell me how you are working through
4 that? Because, quite honestly, I have had less than a day to
5 go through this so I have not read it in detail.

6 MR. NEY: Well, simply put, they are wrong. In
7 this case the state already owns a network and that presents a
8 problem for ENA. The federal government will not pay for
9 anything that was in service prior to January 1, 1998. How the
10 money that is used to purchase the state system so that ENA can
11 sell the service back to the state is going to be eligible is a
12 mystery because that is asking the federal government to pay
13 for something that has already been paid for and put into
14 service. The simple answer to that issue is, we disagree.
15 They are going to use the same state's service.

16 COMMISSIONER HAWKINS: Jackie, would you mind
17 re-explaining to me what I thought I understood you to say
18 awhile ago as far as the FCC says you can and can't do?

19 MS. SHRAGO: It is very clear that the State
20 cannot submit expenditures for owning a network. So the only
21 thing about what Mr. Ney has said that is correct, is that we
22 purchase a network prior to January 1. None of those
23 expenditures are eligible.

24 However, the application from ENA does not relate to those
25 expenditures in any way, shape or form. The FCC entirely

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1 that ISIS has asserted; it just isn't there. So I don't know
2 where they are getting this information. I can find no quotes
3 that allow that. There is clearly an effort to get the best
4 competitive situation. But the best competitive situation also
5 clearly identifies that schools will make the best decisions
6 about what meets the needs of the students.

7 The FCC is not in any way going to assert itself into a
8 state procurement law period, the end, they are not; it is up
9 to us to make those best decisions. So, again, if we are
10 making the best decisions and operating within the state
11 procurement law, I would submit to you that it is very well
12 documented and it was approved by the comptroller's office and
13 the Department of Finance and Administration before it was
14 issued. It was very carefully reviewed; it is very careful
15 written. We believe that we have complied with all of those
16 rules. Does that answer your question?

17 COMMISSIONER HAWKINS: I think so.

18 MR. LEE: Let me ask you this. There was a
19 statement by Mr. Ney about the entering into the contract
20 immediately. How close if we did lift the stay, if the stay
21 was lifted, how close is the contract? I mean, the stay was
22 put in place so you all were having to separate from the table
23 basically.

24 MS. SHRAGO: We had the contract fully
25 negotiated before the stay was put in place. The contract at

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1 this point has been reviewed by F&A and by the comptroller's
2 office and they agreed entirely in the negotiated contract with
3 the changes that were made following the pro forma contract.
4 MR. LEE: Okay. You said the comptroller's
5 office has already agreed?
6 MS. SHRAGO: Yes, Charles has agreed.
7 MR. LEE: With the changes?
8 MS. SHRAGO: Yes.
9 MR. LEE: I was unaware of that. It was my
10 understanding from the comptroller's staff that we have not
11 agreed to that.
12 MS. SHRAGO: I talked with Charles Bilbrey
13 before the stay was in place and --
14 MR. CHARLES HARRISON: Let me get that time line
15 stuff. Let me go talk to Charles about it, there may be some
16 misunderstanding about that. I know we had one issue; I will
17 find out the answer to that.
18 MR. LEE: So it is the department's position
19 that there is no more negotiations needed; it is just lifting
20 the stay and enter the contract and going forward?
21 MS. SHRAGO: Yes.
22 MR. LEE: So you all are ready and you are
23 still 10 days or 12 days away from the trigger date?
24 MS. SHRAGO: Yes.
25 COMMISSIONER HAWKINS: Mr. Barlow, would you

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1 MS. SHRAGO: Yes.
2 DEPUTY COMMISSIONER JONES: Is it a first come,
3 first serve up until the 14th?
4 MS. SHRAGO: No, it is not a first come, first
5 serve.
6 DEPUTY COMMISSIONER JONES: I guess, where I'm
7 heading with this is what damage would there be to the State if
8 we could have a hearing and hear the merits of this thing as
9 early as Wednesday of next week. Then you know that you are
10 sending the application and a good contract up rather than
11 sending one and losing?
12 This way you have got two shots it seems to me. You will
13 be sending the contract you are going to be living with and the
14 application. I don't see why we can't have a hearing in three
15 days.
16 MR. LEE: If there is no more negotiations --
17 MS. SHRAGO: It is clear that we can have a
18 hearing, I guess, the only concern I have got is if we can have
19 a hearing and be certain that we will have sufficient time to
20 negotiate a contract with the protester, if their protest was
21 upheld. The thing we are missing out on, the longer we delay
22 in actually filing the form is the administrative review prior
23 to the close of the 75 day window. They are looking at forms
24 and calling people and saying fix this, fix that, before the
25 window is up. That is what we lose each day we delay sending

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1 address F&A's position on this?
2 MR. ROBERT BARLOW: I just don't know that we
3 have --
4 MR. LEE: Has it ever been approved by F&A?
5 MS. SHRAGO: There was one concern that I had as
6 to term language. That is the one place, actually, I should
7 have clarified that.
8 MR. LEE: So if it is ready then the only thing
9 is that it has to be routed for signatures, executed and then
10 put with the application and sent off?
11 MS. SHRAGO: Yes.
12 MR. LEE: So we have got 12 days to do that
13 with?
14 MS. SHRAGO: Mr. Lee, please don't make it take
15 12 days.
16 MR. LEE: I'm not, but I'm saying --
17 MS. SHRAGO: Yes.
18 DEPUTY COMMISSIONER JONES: I think the question
19 I had; I'm assuming that this contract and application will be
20 sent immediately as soon as it is provided the executed
21 signatures?
22 MS. SHRAGO: Yes, but please don't wait until
23 the last minute to get it in.
24 DEPUTY COMMISSIONER JONES: Is there an
25 advantage for this stay to be in prior to the 14th?

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1 in.
2 MR. LEE: Okay. They won't review it until it
3 is finalized?
4 MS. SHRAGO: Right, and then they kick it out.
5 COMMISSIONER WALTERS: I have been in meetings
6 in Washington with the Chief State School Officer, who is
7 working with the SLC, and they are sending back a great many of
8 these applications for very, very meticulous changes and not
9 changes that are basic to the process, but because they are
10 trying to be very, very careful.
11 My concern as Commissioner is that as far as the 75 day
12 window, there is not a difference in whether you are entered on
13 day one or day 74, but the issue is if you turn something in at
14 the last minute and that is not acceptable for some technical
15 reason, then we are through. It doesn't matter whose name is
16 on the contract. So I'm very eager not to be in the position
17 of filling in this form, no matter how careful we are.
18 If the truth be known, it is Ms. ShrAGO who helped design
19 the forms, so I would think the chances of her messing it up
20 would be fairly limited, but that doesn't mean that it can't
21 happen. I do not want to be in there on a two or three hour
22 turn around because clearly they are being overwhelmed and our
23 chances of receiving nothing will be excellent.
24 MS. SHRAGO: They also have a 150 other of these
25 forms that have to be filed for our schools that is unrelated

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1 to this network, all of which has to be just as accurate.
2 COMMISSIONER HAWKINS: I must suggest that we
3 take a short break.
4 (Whereupon, a short break was taken at 10:07
5 a.m.)
6 (Whereupon, the following proceedings resumed at
7 10:25 a.m.)
8 MR. CHARLES HARRISON: Jackie was correct in
9 what she was saying. There has been communication with our
10 office with Charles Bilbrey and the pro forma contract and the
11 draft that was sent over here was given to the Department of
12 Education, so that aspect is exactly right. However, giving
13 the nature of the protest and some of these issues that has
14 been raised, that is in no way saying that the comptroller's
15 office is ready to sign this contract.
16 COMMISSIONER HAWKINS: I think I'm safe in
17 echoing those sentiments from F&A's standpoint as well; is that
18 right, Mr. Barlow?
19 MR. CHARLES BARLOW: That is correct.
20 COMMISSIONER HAWKINS: Okay, any questions,
21 Mr. Jones?
22 DEPUTY COMMISSIONER JONES: No.
23 MR. LEE: I have one. The 10 days -- you have
24 just got the Commissioner's determination this morning or last
25 night or something and by that you have ten days before you

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1 have to appeal that; I assume that you-all will?
2 MR. NEY: We will ask you right now before the
3 review board and for the purpose of appeals and denial of the
4 protest. The letter was written last night and it was back in
5 my office and is going to be delivered as soon as we got these
6 other matters taken care of.
7 MR. LEE: How soon can you-all be ready?
8 MR. NEY: Well, candidly, I think you will be
9 glad to hear this; I can't imagine that there would be a whole
10 lot more that we could put in front of you, so as soon as you
11 need us to be. Jeff, what about you?
12 MR. HUSTAD: Other than Good Friday.
13 COMMISSIONER HAWKINS: From Wednesday on, I
14 think, is not an option for next week. There is several kids
15 with spring break, etc. How are you-all?
16 MS. COTTRELL: We are ready anytime.
17 MR. LEE: How about Monday morning?
18 COMMISSIONER HAWKINS: I can't Monday morning.
19 I can clear the rest of the day, but I need at least up until
20 about 9:30.
21 MS. COTTRELL: Do we have a problem with Sunday
22 afternoon?
23 MR. NEY: Yes, I do. The possible difficulty
24 with Monday is I have the Bar Association. We are trying to
25 hire a new executive director and I would like to get that

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1 determination made. I'm not saying that it is actually a
2 conflict with the timing; I just suspect that my day is going
3 to be long.
4 COMMISSIONER HAWKINS: What about Tuesday
5 morning?
6 MR. NEY: Tuesday, anytime, that might work
7 during the day.
8 MS. COTTRELL: We will clear our calendar.
9 COMMISSIONER WALTERS: Are you talking about
10 Tuesday morning?
11 COMMISSIONER HAWKINS: Is Tuesday morning an
12 option, anytime Tuesday?
13 COMMISSIONER WALTERS: Can we go early?
14 MR. NEY: As early as you need.
15 COMMISSIONER HAWKINS: How early do you need?
16 COMMISSIONER WALTERS: Well, I don't know, but I
17 don't need to have the Governor in one more wad about going to
18 Shelbyville. On Tuesday until -- well, there is not a way to
19 finesse this. How long does it take to get to Watrace right
20 out of Bedford County? I have been lost all over Tennessee for
21 three years, so there is no sense in my trying to pretend that
22 I know what I'm talking about. It is just better to lay it
23 out. I have got to be there by a 12:45 on Tuesday so that
24 means if I leave this building between 11:30 and 12:45 is
25 that --

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1 MS. COTTRELL: So is Saturday completely out?
2 MR. LEE: I have some conflicts.
3 COMMISSIONER HAWKINS: I have a conflict that
4 can be rearranged.
5 COMMISSIONER WALTERS: Is Monday afternoon a
6 problem?
7 MR. NEY: That is the worst part of the day; I
8 anticipated the morning being bad.
9 COMMISSIONER HAWKINS: Is everybody else
10 available Monday morning besides me?
11 MR. NEY: Monday is a bad day, the afternoon is
12 the worst part of the day. How about Tuesday morning as soon
13 as 7:00 o'clock, would that --
14 MR. ALBERT GANIER: As a party, I would
15 appreciate Monday morning dramatically. I have commitments out
16 of town in California. So if we could go forward with a little
17 inconvenience, it would be a great help.
18 MS. METCALF: Monday morning if we started at
19 8:00 o'clock; would that help you any, if we start early?
20 MR. NEY: No, it really doesn't and then Mr.
21 Hustad, who I may be relying on a little more heavily, cannot
22 be here either on Monday.
23 MS. SHRAGO: Look, we are jeopardizing getting
24 this funding at all. I just have to speak up and say that
25 because it is on my back to get it to happen. This stuff has

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1 to be done; the contract has to be signed; the forms have to be
2 completed.

3 COMMISSIONER WALTERS: Can we start at 7:30
4 Tuesday morning?

5 DEPUTY COMMISSIONER JONES: Yes.

6 COMMISSIONER HAWKINS: But you have a commitment
7 in California, right?

8 MR. ALBERT GANIER: I will just break it. This
9 is one of the most important things in front of the State. I
10 would also like to suggest that you will lift the stay so that
11 the Commission can talk to both parties. These businesses that
12 are filling out these applications are enormous. I think that
13 you should modify the lifting of the stay even if you don't
14 proceed with the protest; you can let the parties talk.

15 I have spent a lot of time in Washington, too, and you are
16 in the process of allowing this to kill this project if you go
17 a long length of time. I am prepared to leave at any time and
18 give up anything to accomplish this mission, either way it
19 comes out, but it should not jeopardize the filing and the
20 administrative reviews based on our research because it is
21 critical to this process. And to deny days of administrative
22 review before Easter weekend, really leaving less than three
23 business days; three business days is critical.

24 The SLC is going to be absolutely overwhelmed with forms
25 and our form is not going to get any better attention. I'm

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1 COMMISSIONER HAWKINS: Sometime between now and
2 Tuesday we need to get together and set a time or else we can
3 be here until 5:00 o'clock today.

4 MS. METCALF: You had a conflict on Saturday?

5 MR. LEE: Saturday I have several conflicts.

6 MS. COTTRELL: I think we are ready any time
7 from when this concludes until Tuesday; I mean, any time in
8 there, I think we will say we are ready. I think Ms. Shrago
9 and Mr. Ganier have very real concerns about getting this up
10 there for administrative review and what that will cost the
11 State.

12 COMMISSIONER HAWKINS: I will switch out
13 a Monday morning.

14 MR. NEY: Monday morning we will work that out

15 COMMISSIONER HAWKINS: 7:30 or 8:00?

16 MS. SHRAGO: You set it?

17 COMMISSIONER HAWKINS: 7:30 Monday morning in
18 this room.

19 MS. COTTRELL: If you-all are ready, we would
20 like to move that the stay be lifted between certainly now,
21 immediately, in terms of allowing any changes to the contract
22 to be made that might address any concerns the other State
23 officials have allowing, if it is necessary, ENA as the
24 contracting party and the State to work out any terms that
25 might be necessary.

Of course, we think that, in fact, going ahead and signing

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1 prepared to meet this afternoon, all day Saturday, all day
2 Sunday, Monday and cancel anything, but I don't think you
3 should go beyond Monday morning and I think you should allow
4 the parties to talk to the State so that we can talk if we have
5 to satisfy questions and to allow both parties to talk.
6 We are truly proceeding to accomplish this and to uncover
7 anything that is wrong and let's get on with this.

8 COMMISSIONER HAWKINS: Who had the conflicts
9 Sunday afternoon?

10 MR. ALBERT GANIER: We need to cancel our
11 conflicts.

12 COMMISSIONER WALTERS: Is Saturday, tomorrow
13 afternoon, out?

14 MR. NEY: Tomorrow afternoon is not good for me,
15 but as Chairman Hawkins suggested if the committee members have
16 not yet focused on this with respect to the merits, that seems
17 like a pretty fast track.

18 COMMISSIONER HAWKINS: I can be ready tomorrow
19 afternoon; I can't be ready tomorrow morning. I can cancel the
20 rest of the calendar today and I can cancel most of Sunday. I
21 think our objective here is protecting the interest of the
22 State and to try to be as accommodating as we can to all
23 parties. We are willing to give, but I need for everybody else
24 to be giving, too, here.

25 MR. NEY: I would prefer to make it --

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1 the contract also should be allowed so that it can get up
2 there. But if, in fact, the protest hearing is going to happen
3 Monday morning, there should be sufficient time, I guess, to
4 sign the contract after that and get it up there. We would
5 suggest that it would be very beneficial if this afternoon if
6 there are any issues that the language of the contract, which
7 it seems like we have heard that there might be a couple, if
8 the State could proceed internally with working those out as
9 well as if they have any questions for me we can work those
10 out. Just so that the language is all set and after the
11 protest hearing it can be signed and the forms sent out and
12 everything if the protest hearing is going to happen.

13 MR. LEE: Mr. Ney, would you be opposed to that
14 in short of signing the contract?

15 MR. NEY: I would just have to say this, if in
16 the event that we are successful in the protest, and there is a
17 protest which was already threatened by ENA, and you went with
18 us, we would be willing to agree that the State can go ahead as
19 long as none of the committee members have that communication;
20 I can expect that you wouldn't do that. I think they can go
21 ahead and do that contingent upon our being given the same
22 rights and opportunities in the event the protest was
23 successful.

24 COMMISSIONER HAWKINS: Do you want to
25 reciprocate?

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1 MS. COTTRELL: We have no problems with that.

2 MS. SHRAGO: Let me make sure that that is
3 clear. That means the four of you cannot talk to ENA but I
4 can; is that what we are saying?

5 COMMISSIONER HAWKINS: Is that what you are
6 proposing?

7 MR. NEY: Well, actually, I don't know how these
8 processes are working. If Ms. Shrago is going to be the
9 principal proponent of the department's position, I do have a
10 concern about that.

11 COMMISSIONER HAWKINS: She is not representing
12 F&A or the comptroller's office.

13 MR. NEY: No, but it sounds to me as though she
14 represents the Department of Education, who we have on the
15 committee

16 COMMISSIONER WALTERS: She has been the
17 coordinator of the RFP process, and there is no question that
18 her technical knowledge that I rely on, in the same way that
19 you rely on Mr. Hustad, I don't think there is any question
20 about that. As far as negotiating this contract, she has been
21 the one working on it and is the one that wrote the RFP. So it
22 would be very difficult for us to start over with somebody else
23 doing that.

24 MR. NEY: We are okay with that.

25 COMMISSIONER WALTERS: Are you all right with

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1 COMMISSIONER HAWKINS: Would that be including
2 Commissioner Walters?

3 COMMISSIONER WALTERS: I have no problem with
4 that.

5 MR. NEY: Yes, it would have to be since she is
6 on the review committee.

7 MR. LEE: She should be the only one on this
8 review committee. We have done this in the past; we have
9 modified a stay to the extent that the contract could go ahead
10 and be negotiated but it could not be executed until the
11 protest was heard. And I think that is in the best interest of
12 the State at this time to get prepared to the extent that if we
13 had that out of the way, got the protesters resolved, that
14 would be --

15 MR. NEY: Sure.

16 MR. LEE: ISIS may also want to be working on a
17 proposal contract so if we get to the point that the protest is
18 upheld.

19 MR. NEY: We have no objection to that; I just
20 wanted that clarification on that point.

21 COMMISSIONER HAWKINS: Let me make sure that I
22 didn't miss something there. Were you said that you may be
23 wanting to work on a contract also, does that mean that you are
24 going to be working around the clock all weekend with both ISIS
25 and ENA between now and 7:30 Monday morning; that is not what I

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1 that?

2 MR. NEY: Yes, we are.

3 COMMISSIONER HAWKINS: Do we need to restate
4 that for the record?

5 MR. NEY: ISIS2000 does not object to the
6 communications for the purposes of negotiating the contract
7 also with Ms. Shrago.

8 COMMISSIONER HAWKINS: And any other party
9 necessary?

10 MR. NEY: No, not any other party necessary;
11 just Ms. Shrago and the representatives of the various
12 departments other than those that sit on the review board.

13 MS. COTTRELL: Could I make a clarification
14 suggestion? What the stay did was stop the State in doing what
15 it would normally do, which is finish the negotiations of the
16 contract and have it approved. Can we just say the State will
17 remain in effect as to final execution, but the State can
18 proceed with everything else it would normally do in this
19 situation short of final execution?

20 MR. LEE: I second that motion.

21 MR. NEY: May I speak to that? To qualify that,
22 just so that it is clear on the record that the members of the
23 review committee, who might otherwise come into the process by
24 virtue of their positions in the various departments, may be
25 excluded from that word

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1 understood you to say?

2 MR. NEY: No, we didn't contemplate that. We
3 just ask that in the event that the review committee determines
4 in favor of us in the protest, and the contract is to be
5 awarded to us, then we then face a protest from ENA but that we
6 be given the same rights to move as quickly as possible to
7 complete it.

8 COMMISSIONER HAWKINS: I understand

9 MR. LEE: I just want ISIS to be prepared

10 if we do uphold the protest, then they are not saying we will
11 have you a proposed contract in 24 or 48 hours or something
12 just want them to be prepared to make a proposed contract.

13 COMMISSIONER HAWKINS: Okay. I understand what
14 you are saying.

15 COMMISSIONER WALTERS: Now we have agreed that
16 the members of the review committee do not talk to anybody
17 about this, but that the people in the other departments can
18 continue?

19 COMMISSIONER HAWKINS: Right.

20 MR. NEY: Right.

21 MS. METCALF: I just wanted to check one thing.
22 Is it the committee's pleasure to have the transcript serve as
23 your written determination on lifting the stay to the effect
24 that it has been agreed to? Since a written determination is
25 required, I just wanted to clarify that

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1 COMMISSIONER HAWKINS: Yes.
2 COMMISSIONER WALTERS: Would like to say to both
3 parties that we are grateful for your cooperation in this and
4 we are grateful for your understanding of the deadlines. It
5 does mean a great deal to us for the schools to have this and
6 we appreciate the efforts that you-all have made to make this
7 work.
8 MR. LEE: Natasha, do we need to vote?
9 MS. METCALF: Sure. I think you should make a
10 motion.
11 MR. LEE: The motion as per both counsels I make
12 a motion that the stay be lifted to the extent that the
13 execution of the contract cannot be accomplished and the
14 members of this review committee cannot be a party to any
15 negotiations.
16 DEPUTY COMMISSIONER JONES: I will second that.
17 COMMISSIONER HAWKINS: All in favor say, Aye.
18 (Whereupon, all members of the review committee
19 said, Aye.)
20 COMMISSIONER HAWKINS: The committee will
21 reconvene at 7:30 Monday morning in this room.
22 MR. LEE: Let me ask this. Mr. Ney, you said
23 that there might be some more documentation that would need to
24 be
25 MR. NEY: Actually, I can't imagine there would

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1 can have them by the end of the day?
2 MR. NEY: Yes, sir.
3 COMMISSIONER HAWKINS: Again, thanks to both of
4 you.
5 (Whereupon, the aforementioned meeting was over
6 at 10:42 a.m.)
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1 be much more.
2 MS. COTTRELL: I don't think there is anything
3 other than what is in there; we may have him explain some
4 things in there.
5 MR. LEE: I'm trying to think of a time that we
6 could have that stuff in so we can look at it, have ample time
7 to look at it.
8 MS. COTTRELL: By the end of the day?
9 MR. LEE: Yeah, by the end of the day, today, so
10 we will be able to see it.
11 MS. COTTRELL: By the end of the day, 5:00 or
12 4:30?
13 MS. SADIE ROSSON: Is there anything else?
14 MR. LEE: The awarding party of ENA has said
15 that they might have some documents.
16 MS. COTTRELL: I don't anticipate any additions
17 to the record. I mean, the record speaks for itself what all
18 of the proposals were and all of that stuff. I would
19 anticipate some expandatory information, exhibits and that sort
20 of thing and perhaps a written statement to you, if I can get
21 it done by the end of the day.
22 MR. LEE: Mr. Ney, can you --
23 MR. NEY: We may have to re-read Commissioner
24 Walters' letters and maybe write one or two things.
25 COMMISSIONER HAWKINS: But they are there and we

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1 STATE OF TENNESSEE }
2 COUNTY OF DAVIDSON } ss.
3
4 I, LISA NIEDZWIECKI, Notary Public in and for the State
5 of Tennessee at Large,
6 DO HEREBY CERTIFY that the foregoing hearing thereof and
7 the proceedings of said hearing were stenographically reported
8 by me in shorthand; and that the foregoing pages constitute a
9 true and correct transcription of said proceedings to the best
10 of my ability.
11 I FURTHER CERTIFY that I am not a relative or employee
12 or attorney or counsel for any of the parties hereto; nor a
13 relative or an employee of such attorney or counsel, nor do I
14 have any interest in the outcome or events of this action.
15 IN WITNESS WHEREOF, I have hereunto affixed my official
16 signature and seal of office this 5th day of April, 1998.
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My Commission Expires July 24, 1999

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COPY

COMMITTEE REVIEW MEETING

#14

Taken on April 6, 1998

APPEARANCE OF THE REVIEW COMMITTEE:

MS. JANE WALTERS, Department of Education

MR. DUANE HAWKINS, Chief Operating Officer, Department of
Finance and Administration

MR. ED JONES, Deputy Commissioner, Department of General
Services

MR. ROBERT LEE, Staff Attorney, Comptroller's Office

ALSO PRESENT:

Ms. Natasha Metcalf

Mr Deryl Bauman

Mr. Paul Ney, Jr.

Mr. Matthew Chelap

Ms. Martha Staley

Ms. Amy Bearman

Mr. Jeff Roberts

Ms. Jamie Porter

Ms. Sadie Rosson

Mr. Charles Harrison

Ms. Melinda Parton

Ms. Elaine Williams

Mr. Jay Dunlgo

Mr. Phil Evans

Ms. Vickie Stanfire

Ms. Tammie Tucker

Mr. Albert Ganier III

Ms. Patricia Cottrell

Mr. Richard Lodge

Mr. Paul Van Horsa

Ms. Jackie Shrago

Ms. Velvet Hunter

Mr. Robert Barlow

Ms. Eileen Amaba

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1 COMMISSIONER HAWKINS: I believe we are ready to
2 get started. I appreciate you-all being here on such short
3 notice and the fact that daylight savings time kicked in
4 yesterday morning. Hopefully our biological clocks have kicked
5 in at the same time, but there is probably some room for doubt.

6 The purpose of the hearing this morning before the review
7 panel is to hear, again, the RFP 97-2 protest issue by ISIS. I
8 will, for clarification, state what the procedure will be. I
9 will start again by reintroducing the members of the panel. To
10 my immediate left is Commissioner Jane Walters, the
11 Commissioner of Education. To my immediate right is Bobby Lee,
12 Staff Attorney for the Comptroller's Office. To his right is
13 Ed Jones, Deputy Commissioner for the Department of General
14 Services. My name is Duane Hawkins and I serve as Chief
15 Operating Officer of the Department of Finance and
16 Administration.

17 Ms. Natasha Metcalf will present the timelines and the
18 protest issues. I will make sure that she does that before we
19 start with the presentation this morning. The focus of the
20 panel, obviously, would be to try to make a determination with
21 the question, did each issue being protested meet the
22 requirements of the RFP? We will try to remain focused on
23 those issues.

24 The order of presentation will be ISIS will present first,
25 followed by questions of the panel; at that point we will take

1 a break for approximately 10 minutes. Then we will resume and
2 Ms. Metcalf will reframe the issue. We will then listen to the
3 presentation by the Department of Education by Jackie Shrago,
4 again, followed by questions and again a break. Then ENA will
5 have an opportunity to present, following the Department of
6 Education as the winning bidder.

7 Then at that point we will make a determination among the
8 panel to either vote on the issues individually or collectively
9 as a group. So that being the format -- also for the record,
10 for our court reporter here, if you would identify yourself
11 prior to your presentation, Ms Metcalf.

12 MS. METCALF: Again, very briefly, the RFS was
13 issued December 29th, 1997, for its expansion in network
14 operation of ConnectEN. The RFS was amended and reissued on
15 February 5th of this year. Proposals were submitted by
16 Education Networks of America and ISIS2000. The proposals were
17- evaluated and ENA was determined to be the winning proposer.

18 The notice of intent to award the contract to ENA was sent
19 on March 20th and the protest and request for a stay was filed
20 by ISIS on March 30th, but I believe it was dated March 29th.
21 The issues raised in the protest are as follows: Whether ENA
22 failed to complete required tests; whether ENA's cost proposal
23 misrepresents E-rate Rules and funding; whether the legal
24 status of ENA to participate in the process is questionable;
25 whether ENA lacks the requisite financial responsibility to

1 fulfill its obligations under its proposal and whether ENA
2 failed to submit cost data in a sealed envelope.

3 On March 31st the Department of Education requested that
4 the review committee convene to consider their request to lift
5 the stay. On April 2nd Commissioner Walters rendered her
6 decision denying the protest. On Friday, April 3rd, the
7 committee convened to consider the department's request to lift
8 the stay. Upon being advised by counsel for ISIS that they
9 intended to request a review committee hearing to consider
10 Commissioner Walters' decision. The committee decided to
11 proceed with the hearing on the merits on an expedited basis.

12 ISIS hand delivered a letter that afternoon formalizing
13 their request that the review committee consider the merits.
14 The review committee also lifted the stay to the extent to
15 allow the departments to continue contract negotiations with
16 ENA.

17- COMMISSIONER HAWKINS: Thank you.

18 MS. COTTRELL: I don't think we got a copy of
19 the letter on Friday, but I assume it is as Mr. Ney stated. I
20 know he did it on the record Friday.

21 MR. NEY: We will make sure that you get one.

22 COMMISSIONER HAWKINS: Okay, Mr. Ney.

23 MR. NEY: Thank you. Before we get into our
24 presentation in chief, I would like to ask for the indulgence
25 of the committee for a couple of issues. First, I have a

1 strong sense that at some point during ENA's presentation Ms.
2 Cottrell is going to let you know that there is a burden of
3 proof, or what appears to be a burden of proof on ISIS2000, to
4 demonstrate each and every element of the protest charges that
5 we have made in order for them -- we have to persuade you that
6 you need to do something other than what is going to happen
7 otherwise.

8 That being the case and because the lawyers are all
9 familiar with this process usually the parties that has the
10 burden of proof at least gets to say a few final words after
11 everybody else has responded to our case in chief. If we might
12 have that opportunity to say something after everyone else, I
13 would appreciate it.

14 Secondly, we would like to ask the committee today and ask
15 ENA to agree to consider the property disposition issue in this
16 protest. We want to do that and I'm asking that right now
17 because I don't want to get into what appears to be some sort
18 of game playing or somebody misinterprets something we do. If
19 you do not consider that today on the merits, it could be an
20 effort to delay this process; that is not our intent in any
21 way, shape or form.

22 We want to expedite this. We know the State has a lot of
23 interest in making sure that this is done correctly. However,
24 if it is not considered in this proceeding, it may have to be
25 considered at some other time and that may only possibly slow

1 down the process. I don't want this to appear to be a game; it
2 is not a game.

3 COMMISSIONER HAWKINS: I understand. With
4 regard to that issue, let me ask you a couple of questions.
5 No. 1, whether that is a protestable issue or not would be
6 determined by the Commissioner of General Services and the
7 Commissioner of the respective department, in this case being
8 the Department of Education: they would make that
9 determination. But first and foremost, as far as protestable
10 issues are concerned, it is not -- given the timelines for
11 requiring to protest an issue, would that be outside that
12 frame? I'm not sure. I will defer to Deputy Attorney General
13 Sadie Rosson to kind of clarify that a little bit, but I'm not
14 sure that is an issue that we are permitted because of being
15 outside of the ten day timeline.

16 MR. NEY: Well, may if I address that. It is
17 not outside of the ten day timeline. The requirement is that
18 we file within ten days of the date we know facts that support
19 the protest. It was on April 2nd when I was going through this
20 contract and looking and wanting to make sure that the State
21 had done, what I think everyone assumes the State does, which
22 is follow its on law.

23 I made the request for the information about the compliance
24 with that provision. It was on that data that Ms. Jeter
25 informed me that it was the view of the Department of Education

1 that they didn't have to comply Up until that point, it seems
2 as though with that and every other issue in here, we assume
3 the State is doing its business.

4 We learned on that day, the 2nd of April, that it did not
5 do its business the way we think it needs to be done and that
6 is the basis for the protest. That is why we think we are not
7 outside of the ten day timeline.

8 COMMISSIONER HAWKINS: Ms. Rosson.

9 MS. SADIE ROSSON: Of course, it is within the
10 purview of the review committee to determine whether or not an
11 issue is timely. So Mr. Ney is certainly welcome, I think, to
12 address the issue however he sees fit. With regard to the
13 timeliness issue, it is my understanding that ISIS is saying
14 the State does not have the authority to sell the equipment
15 described in the RFP rather than discussing how the State did
16 it.

17 My understanding is, and I don't have an encyclopedia of
18 the RFP, that the RFP requires that if you have any objections
19 to the terms of the RFP, they need to be raised in a question
20 and answer hearing. It is my understanding that no objection
21 was raised to selling the State's equipment at that time.

22 Furthermore, the RFP, and my understanding is that both
23 proposers suggested in their proposal that they would be
24 willing to purchase equipment from the State. My understanding
25 is that the issue was not raised within the ten days when they

1 reviewed the file.

2 I think what Mr. Ney is saying is the State cannot sell
3 this property rather than determining how the State can sell
4 the property. For that reason the review committee, I think,
5 is saying it is not timely but, again, that is the decision of
6 the review committee to make.

7 From my looking at the statutes, and I'm not sure that I
8 have looked at all of the relevant statutes, the ones that I
9 have seen is whether and to what extent the State can sell
10 property really needs to be made by the Commissioner of General
11 Services. Whether or not that determination has been made I'm
12 not specifically aware. I don't think the Commissioner has yet
13 made that determination.

14 So if the review committee is to make a decision which
15 would impact the decision making and the discretion of the
16 Commissioner of General Services, at this juncture, is probably
17 premature. Again, that is a determination for the review
18 committee to make.

19 MR. NEY: I would just like to say something in
20 regard to Ms. Rosson's characterization. We aren't saying that
21 the State can't sell property. The State can sell property.
22 We are just saying that it has to go through the correct
23 processes. It was even conceivable that this process would
24 have been correct if certain things had been done, which we now
25 know as of April 2nd by Ms. Jeter's response in the letter were

1 not done. It could have been done within something
2 characterized as an RFS if certain procedures were done. I
3 don't think that the General Services Commissioner has the
4 discretion not to comply with the notice requirements that are
5 statutory. They may have some measure of discretion to modify
6 certain circumstances in the rules and regulations but they
7 clearly cannot modify the statute.

8 One of the key elements of the problem with this process,
9 which could have been cured if certain procedures were followed
10 in the RFS, was giving notice; the key problem would be the
11 notice provision. That is statutory; that is not a regulation
12 and that is not discretionary in any measure.

13 So for that reason, we are not saying no the State can't do
14 it; we are saying the way it is contemplated to be done here
15 cannot be done. It can only have been known when the State
16 Department of Education says, no, we don't consider this even
17 applicable. It was conceivable and very possible that it was
18 being done correctly until they gave us notice that, no, they
19 didn't intend to follow those rules. That is why we think it
20 is appropriate and that is why we think that we are within the
21 10 day period.

22 The bind that we will all be in is ultimately this review
23 committee can make determinations about what is timely or not,
24 that is clearly yours to do. Of course, in the meantime the
25 committee has to deal with an automatic stay that is going to

1 be put in place just by virtue of filing a petition of protest
2 and that is too much playing around I think. We will do it if
3 we have to protect my client's interest. I would rather it
4 just be addressed here on the merits to the extent that it can
5 be. I'm not suggesting that this committee needs to
6 overrule the determination by the General Services
7 Commissioner. I just think that it is appropriate to address
8 that on the merits to the extent that you have the authority to
9 address it as opposed to not addressing it at all because it is
10 untimely. That is our request.

11 COMMISSIONER HAWKINS: Do you-all have a
12 comment?

13
14 COMMISSIONER WALTERS: I believe I'm correct in
15 this room that Ms. Rosson is the attorney that advises the
16 panel; is that correct?

17- MR. LEE: Yes.

18 COMMISSIONER HAWKINS: Yes.

19 COMMISSIONER WALTERS: I believe that since this
20 is something that was not within the items mentioned in the
21 protest that we might have an opportunity to speak with
22 Ms. Rosson?

23 COMMISSIONER HAWKINS: Is that appropriate?

24 MS. METCALF: That is fine.

25 COMMISSIONER HAWKINS: Publicly, here?

1 COMMISSIONER WALTERS: I think there are rules
2 about attorney/client privilege that we are all aware of.

3 COMMISSIONER HAWKINS: Can we take a five minute
4 recess to confer.

5 (Whereupon, a short recess was taken at
6 7:54 a.m. and the review committee conferred with counsel.)

7 (Whereupon, the following proceedings resumed
8 at 8:02 a.m.)

9 COMMISSIONER HAWKINS: I believe we are ready to
10 reconvene, Ms. Rosson.

11 MS. SADIE ROSSON: I just wanted to make sure
12 that the record is really clear that I advised the members of
13 the review committee. They asked questions and I answered
14 those. There was absolutely no deliberations, whatsoever, that
15 occurred outside of this room outside of our conversation; is
16 that correct?

17 COMMISSIONER HAWKINS: That is correct. We have
18 two issues. One being as far as the timeliness issue is
19 concerned, we are highly sensitive to that. Secondly, the
20 commissioner that makes this determination, Commissioner of
21 General Services, has not reviewed nor made any direction
22 regarding any sale of property. I think, therefore, for the
23 record it is not within the purview of the review committee,
24 but we would like to hear ISIS presentation as far as the
25 property issues are concerned and then we would move ahead. I

1 that the consensus of the committee?

2 MR. LEE: Yes.

3 DEPUTY COMMISSIONER JONES: I believe so.

4 MS. COTTRELL: I'm sorry, could I have a
5 clarification on that. It is not part of the protest? Is that
6 what you are saying is that it is not in the purview of the
7 committee so therefore it is not part of the protest; is that
8 what you are saying?

9 COMMISSIONER HAWKINS: Let me make sure, Ms.
10 Rosson.

11 MS. SADIE ROSSON: My understanding is that, I
12 think, a motion hasn't been made and a determination has not
13 been made by the review committee.

14 COMMISSIONER HAWKINS: That is correct.

15 MS. SADIE ROSSON: So what I believe the review
16 committee intends to do is while there does not appear to be in
17 the purview of the review committee, my understanding is that
18 the members wanted to hear Mr. Ney on that issue and then they
19 can make the determination as to whether or not it is, in fact,
20 within the purview of the review committee after being fully
21 informed.

22 MS. COTTRELL: Could I respond with one small
23 issue which, again, is the timeliness. Again, it is ten days
24 of when you knew or should have known. Mr. Ney is saying that
25 he only asked about this issue on the 2nd. Should have known